

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

_____	)	
IN RE MUNICIPAL DERIVATIVES	)	MDL No. 1950
ANTITRUST LITIGATION	)	
_____	)	Master Docket No. 08-02516 (VM) (GWG)
	)	
THIS DOCUMENT RELATES TO:	)	
	)	
ALL ACTIONS	)	
_____	)	

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNCONTESTED MOTION FOR
PRELIMINARY APPROVAL OF SETTLEMENT WITH DEFENDANT BANK OF
AMERICA, N.A.**

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I. INTRODUCTION

Plaintiffs the City of Baltimore, MD, the Central Bucks School District, and the Bucks County Water & Sewer Authority (“Class Plaintiffs,” or “Plaintiffs”), individually and on behalf of the putative Class of purchasers in this action (the “Settlement Class,” or “Class”), have entered into an agreement (“Settlement Agreement”) with defendant Bank of America, N.A. (“Bank of America”).¹ As set forth below, the Settlement Agreement was negotiated at arm’s length by experienced counsel, is reasonable and appropriate, and is deserving of preliminary approval by the Court.

Pursuant to the Settlement Agreement with Bank of America, and as described in more detail below, Bank of America has agreed to pay \$20 million, or with a potential opt out reduction, \$19.25 million, plus any funds remaining in the State AG Escrow Fund that, as of the date that Notice is issued, the Defendant has access to pursuant to the terms of the State AG Settlement, in exchange for dismissal of claims by the Class against Bank of America in this litigation. *See* Bank of America Settlement Agreement (Ex. 1 to Plaintiffs’ Motion for Preliminary Approval). Additionally, Bank of America has agreed to provide reasonable cooperation, including discovery cooperation, to Class Plaintiffs’ Counsel.

The settlement is significant and of substantial benefit to the Class, and is recommended for approval. Unlike any other defendant, Bank of America is the cooperating amnesty applicant. As a result, under the ACPERA statute, Bank of America does not face the same risk of treble damages and joint and several liability as other Defendants. Moreover, as the cooperating ACPERA applicant, Bank of America has provided significant cooperation to Class throughout this litigation.

¹ Unless otherwise defined, all Capitalized Terms in this memorandum have the same meaning as set forth in the Settlement Agreement.

The proposed settlement, following settlements with Morgan Stanley, JPMorgan, and Wachovia/Wells Fargo, continues to offer a path for the resolution of this five-year-old litigation. The proposed settlement provides substantial additional monies to the Class above amounts negotiated by State AGs which have been significant, but which, Class Counsel have contended, would be improved by a coordinated or combined approach to prosecuting Defendants facing liability in this action. As the Court is aware, the State AGs have entered a series of out-of-court opt-in settlements establishing settlement funds of \$62.5 million (BoA), \$63.3 million (UBS), \$54.5 million (Wachovia/Wells Fargo), \$65.5 million (JPMorgan), and \$30 million (GE). These settlements, however, did not end Defendants' liability in this class action. The Settlement Amount of \$20 million is additive to the amount which State AGs have pledged to make available through their opt-in settlements. Thus, the settlement is offered to the Court as part of an ultimate resolution of the claims against Bank of America and requiring this defendant to make total payments to purchasers of municipal derivatives through this settlement and the State AG opt-in settlement of approximately \$82.5 million.

At this preliminary approval stage, the Court simply determines if the Settlement Agreement, on its face, is "at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard," *i.e.*, whether the settlement is within the range of possible approval. *In re NASDAQ Mkt. Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("*NASDAQ I*"). Because the settlement provides substantial monetary and non-monetary relief to the Settlement Class, it is well within the range of possible approval and should be preliminarily approved by the Court under Federal Rule of Civil Procedure 23(e). In addition, the Settlement Class meets the requirements of Rule 23, and Class Plaintiffs are committed to providing the best practicable notice to the Settlement Class at an appropriate time. Should this

Court grant preliminary approval, Class Plaintiffs will submit a notice plan shortly thereafter, consistent with the notice plans that have already been approved by this Court for prior settlements.

II. BACKGROUND

A. The Litigation

This litigation was commenced in March 2008 with the filing of two class action lawsuits by purchasers of municipal derivatives against Defendants. On June 16, 2008, the United States Judicial Panel on Multidistrict Litigation transferred the cases to this Court. Pursuant to several pretrial orders, the Court consolidated or coordinated all related actions under the above caption. In its Order of July 25, 2008 (Docket No. 174), the Court appointed Cohen Milstein, Hausfeld & Toll PLLC², Boies, Schiller & Flexner LLP, and Susman Godfrey LLP to serve as Interim Co-Lead Counsel for the plaintiff Class.

The Third Consolidated Amended Class Action Complaint (“CAC”) filed by Plaintiffs in March 2013 (Docket No. 1764) alleges that certain Provider Defendants, Provider Co-Conspirators, Broker Defendants, and Broker Co-Conspirators (collectively referred to herein as “Defendants”) conspired to fix, maintain or stabilize the price of, and to rig bids and allocate customers and markets for, municipal derivatives.³ Plaintiffs seek damages under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs contend that, as a direct result of the unlawful behavior alleged in the CAC, they and others similarly situated were injured when price competition for municipal derivatives was restrained, suppressed or eliminated in the United States; bids charged by Defendants to Plaintiffs

² On November 21, 2008, Hausfeld LLP moved for an amendment of the Court’s order appointing interim Co-Lead Interim Counsel, requesting that the firm Hausfeld LLP be substituted for Cohen, Milstein, Hausfeld & Toll, PLLC. (Docket No. 319). The Court granted Hausfeld LLP’s motion on December 9, 2008. (Docket No. 327).

³ Class Plaintiffs filed a Corrected Third Consolidated Amended Class Action Complaint on October 3, 2013, with the Court’s approval. (Docket No. 1800). The allegations are substantively the same.

and members of the Class were fixed, stabilized and maintained at non-competitive levels across the United States; customers and markets were allocated among Defendants and their co-conspirators; Plaintiffs and members of the Class received lesser interest rates on municipal derivatives than they would have received in a competitive marketplace, unfettered by collusive and unlawful activities; and competition in the sale of municipal derivatives was restrained, suppressed or eliminated in the United States. In 2010, after extensive briefing from all parties, this Court previously denied Defendants' motion to dismiss these claims as alleged in the Second Amended Complaint. *Hinds Cnty. v. Wachovia Bank, N.A.*, 700 F. Supp. 2d 378 (S.D.N.Y. 2010).

On August 27, 2010, Class Plaintiffs entered into a settlement agreement with Morgan Stanley (the "Morgan Stanley Settlement"). Pursuant to the Morgan Stanley Settlement, Morgan Stanley agreed to pay \$6,500,000 to settle the Class Action and agreed to cooperate with the Class Plaintiffs. On October 21, 2011, Class Plaintiffs entered into a settlement agreement with Wachovia Bank, N.A., n/k/a Wells Fargo Bank, N.A., and Wells Fargo & Company (collectively, "Wachovia") (the "Wachovia Settlement"). Pursuant to the Wachovia Settlement, before opt-out reductions, Wachovia agreed to pay the greater of \$37,000,000 or 65% of the total amount that Wachovia agreed to pay as restitution as part of the settlement agreement with the State AG Working Group to settle the Class Action, and to cooperate with the Class Plaintiffs. On April 18, 2012, Class Plaintiffs entered into a settlement agreement with J.P. Morgan Securities LLC ("JPMorgan") (the "JPMorgan Settlement"). Pursuant to the JPMorgan Settlement, before opt-out reductions, JPMorgan agreed to pay \$44.575 million to settle the Class Action, and to cooperate with the Class Plaintiffs.

B. The Settlement Agreement

The Settlement Agreement includes the following material terms:

1. Proposed Settlement Class

The Bank of America Settlement Agreement defines the Bank of America Settlement Class as:

All state, local and municipal government entities, independent government agencies, quasi-government, non-profit and private entities that (i) purchased by negotiation, competitive bidding or auction Municipal Derivative Transactions with Defendant, the Releasees or any Alleged Provider Defendant or Alleged Provider Co-Conspirator, or (ii) purchased by negotiation, competitive bidding or auction Municipal Derivative Transactions brokered by any Alleged Broker Defendant or Alleged Broker Co-Conspirator, at any time from January 1, 1992 through August 18, 2011, in the United States and its territories or for delivery in the United States or its territories, excluding (a) any entity that provided Defendant with a release of any claims it may have against Defendant as a result of opting into the State AG Settlement; (b) any state whose Attorney General enters into the State AG Settlement; (c) any entity that has otherwise settled with Defendant and/or otherwise provided a release of any claims it may have against Defendant; (d) the Defendant or Releasees; (e) any Alleged Provider Defendant, Alleged Provider Co-Conspirator, Alleged Broker Defendant and Alleged Broker Co-Conspirator; and (f) any judge, justice or judicial officer presiding over this matter and the members of their immediate families and judicial staffs.

See Ex. 1 at ¶ 4.

2. The Settlement Fund

Bank of America agreed to pay a Settlement Amount of \$20,000,000, minus potential opt-out reduction (discussed below), plus any funds remaining in the State AG Escrow Fund that, as of the date that Notice is issued, Bank of America has access to pursuant to the terms of the Bank of America State AG Settlement (“Bank of America Settlement Amount”).⁴ Ex. 1 at ¶ 1(gg). Pursuant to the terms of the Settlement Agreement, Bank of America will wire transfer ten million dollars (\$10,000,000.00) for the benefit of the Class within ten (10) business days after the execution of the Bank of America Settlement Agreement and the receipt of written wiring

⁴ The Agreement notes that notwithstanding this Paragraph (ff), the Bank of America Settlement Amount shall not include any funds in the State AG Escrow Fund as of the date that Notice is issued that Bank of America has contractually agreed to pay as of that date. *Id.*

instructions and a W-9 form, which amount will be placed in escrow pending the final approval of the settlement by the Court. *Id.* at ¶ 8. Should this Court grant final approval of the settlement, the balance of the Bank of America Settlement Amount shall be paid into the Bank of America Settlement Fund by Bank of America within ten (10) business days after the Court enters the Final Approval Order and Judgment. *Id.* at ¶ 8.

3. Bank of America's Cooperation

Pursuant to the Settlement Agreement, Bank of America agrees to provide reasonable cooperation, including discovery cooperation, to Class Plaintiffs' Counsel, for the benefit of the Class. *See* Ex. 1 at ¶ 21. In the event any disagreement arises, the parties may seek resolution by the Court. *Id.*

4. The Release

Through the Settlement Agreement, Class members agree to release:

any and all manner of claims, demands, rights, actions, suits, counterclaims, cross claims, set offs, causes of action of any type, whether class, individual or otherwise in nature, fees, costs, penalties, fines, debts, expenses, attorney fees, damages whenever incurred, and liabilities of any nature whatsoever (including joint and several), known or unknown, suspected or unsuspected, asserted or unasserted, whether common law, equitable, or statutory . . . relating in any way to any conduct prior to the date of this Agreement and arising out of or related in any way to (i) the purchase of Municipal Derivative Transactions in the United States or its territories or for delivery in the United States or its territories during the period from January 1, 1992 to August 18, 2011, or (ii) any conduct alleged in the Action or that could have been alleged in the Action against the Releasees by Class Plaintiffs, any Class Members or Releasers.

The release applies only to Bank of America entities and personnel and not to any non-settling Defendants.⁵

5. Rescission Based on Opt-Outs

⁵ The Bank of America release provision is found at ¶ 13 of the Settlement Agreement, "Released Claims" is defined at ¶ 1(cc), "Releasees" is defined at ¶ 1(dd), and "Releasers" is defined at ¶ 1(ee).

The Settlement Agreement permits Bank of America to rescind the agreement if the number of Class members who elect to opt out of the Settlement Class exceeds an agreed-upon threshold (the “Opt-Out Percentage”). Ex. 1 at ¶ 46(b).⁶ The Opt-Out Percentage is reflected in an Supplemental Agreement between the parties and can be made available to the Court if requested. *See In re Mutual Funds Inc. Litig.*, No. 04-md-15861, 2010 WL 2342413 (D. Md. May 19, 2010) (side letter reflecting terms of opt-out recission agreement).

6. Provisional Opt-Out Reduction

The Settlement Agreement provides a limited refund to Bank of America with respect to specific Settlement Class members who opt out of the settlements. Specifically, if one or more plaintiffs in the actions identified in Exhibit A to the Bank of America Settlement Agreement validly excludes itself or themselves from the Class, the Settlement Amount may be reduced by up to, and no more than, \$750,000. *See* Ex. 1 at ¶ 49. Should a reduction in the Settlement Amount be necessary due to any such exclusions, such reduction shall be effectuated by reducing Bank of America’s payment of the balance of the Settlement Amount. Ex. 1 at ¶ 49.

7. Notice and Administration Costs

The Settlement Agreement provides that a portion of the Settlement Amount may be used for reasonable Notice and Administration costs of the Settlement. *See, e.g.*, Ex. 1 at ¶¶ 1(z), 5-6, 9, 16. This portion of the Settlement Amount may be used for the distribution of and administration of notice and a separate claim form, and include such reasonable costs related to: (1) creation and distribution of notice to potential class members, (2) publication of notice and/or claim forms to potential class members, (3) designing, mailing of, and administration of a separate claim form to potential class members, and (4) administration of the notice and allocation process for this case.

⁶ The Opt-Out Percentage that triggers the right of Bank of America to rescind the agreement is often referred to as a “blow percentage.” The exact “blow percentage” is not relevant to Class members’ decision as to whether to remain in or exclude themselves from the Settlement Class. What is relevant is the amount being paid, the cooperation terms, and the release terms.

8. Attorneys' Fees & Expenses

The Settlement Agreement provides that "Class Plaintiffs' Counsel may, at their discretion and election, choose to submit an application or applications to the Court (the "Fee and Expense Application") for distributions to them from the Gross Settlement Fund, for an award of attorneys' fees or reimbursement of expenses incurred in connection with prosecuting the Action." *Id.* at ¶ 23. Class Counsel will do so before the objection deadline for Class Members in connection with this Settlement.

III. ARGUMENT

The settlement is significant and of substantial benefit to the Class, and is recommended for approval. This settlement is materially greater than the settlement with Morgan Stanley that this Court approved in 2011. Moreover, while the settlement is lower than the settlements with JPMorgan and Wachovia approved by the Court in 2012, Bank of America is in materially different position from those other Defendants. Defendant Bank of America is the cooperating amnesty applicant and as a result, under the ACPERA statute, does not face the same risk of treble damages and joint and several liability as other Defendants. Moreover, as the cooperating ACPERA applicant, Bank of America has provided significant cooperation to Class throughout this litigation.

A. The Settlement of Complex Litigation is Favored

Class Plaintiffs and Bank of America have reached an agreement that provides a significant recovery and guarantees reasonable cooperation from Bank of America in the prosecution of Plaintiffs' claims against the non-settling Defendants. Having negotiated for a substantial consideration from Bank of America, Plaintiffs have avoided the potential risks inherent in complex antitrust class action litigation and secured a favorable settlement for the Settlement Class. Reaching such a positive result at this stage in the litigation makes the settlement even more

attractive (particularly given that Bank of America denies liability for Plaintiffs' claims against it). *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004). In assessing this proposed settlement, the Court should be mindful of the "general public policy favoring settlement." *In re Air Cargo Shipping Serv. Antitrust Litig.*, No. 06-md-1775, 2009 WL 3077396, at *6 (E.D.N.Y. Sept. 25, 2009).

B. The Proposed Settlement Exceeds the Standard for Preliminary Approval

When parties to a class action seek to settle, they must first seek preliminary approval of the proposed class action and certification of a settlement class. Then, if preliminary approval and class certification are granted, they must provide notice to the settlement class and appear at a fairness hearing, after which time the Court may grant final approval of the settlement. *See Manual for Complex Litigation* (Fourth) § 21.63 (2004); *NASDAQ I*, 176 F.R.D. at 102. Because the first step of the process is "preliminary," the standards for preliminary approval are less exacting than those applied for final approval. "[T]he court must make 'a preliminary evaluation' as to whether the settlement is fair, reasonable and adequate." *In re Currency Conversion Fee Antitrust Litig.*, No. 01 MDL 1409, 2006 WL 3247396, at *5 (S.D.N.Y. Nov. 8, 2006) (quoting *NASDAQ I*, 176 F.R.D. at 102); *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005). Preliminary approval is granted so long as the settlement was arrived at through a fair process and the terms of the settlement are within the "range of possible approval." *NASDAQ I*, 176 F.R.D. at 102 (emphasis added).

In conducting its preliminary approval inquiry, a court considers both the negotiating process leading up to the settlement and the settlement's substantive terms. *In re Global Crossing*, 225 F.R.D. at 455 (citations omitted). Preliminary approval should be granted "if the settlement is the result of serious, informed and non-collusive negotiations and the proposed settlement has no obvious deficiencies, such as giving preferential treatment to class representatives, or granting

excessive attorney's fees." *In re Medical X-Ray Film Antitrust Litig.*, No. CV 93-5904, 1997 WL 33320580, at *6 (E.D.N.Y. Dec. 26, 1997) (citations omitted).

The negotiations here were conducted by experienced counsel on both sides at arm's length over a period of several years, and included various mediation sessions. See Decl. of Michael D. Hausfeld in Support of Plaintiffs' Motion for Preliminary Approval ("Hausfeld Decl."), at ¶¶ 5-7. Plaintiffs' attorneys were well-informed of all material facts and the negotiations were non-collusive. See *id.* at ¶¶ 5, 7-9. Moreover, the Settlement Agreement is well within the range of possible approval. As will be demonstrated in further detail at the final fairness hearing, the proposed settlement with Bank of America is "fair, reasonable, and adequate." See *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974).⁷

The Settlement Amount also must be seen in combination with separate payments contemplated by the Settlement. The Settlement Amount of approximately \$20,000,000 is in addition to what Bank of America has paid the State AGs as part of their opt-in settlement. Thus, the settlement is offered to the Court as part of a resolution with Bank of America where Bank of America will make payments to Class members through this Settlement and through the opt-in settlement for a combined total of up to approximately \$82.5 million.

Further, the structure of the settlement augments an out-of-court settlement process taking place between some Defendants and a State AG working group. The proposed settlement thus takes into account the State AG settlement process and provides substantial additional monies to the Class above amounts negotiated by State AGs. The settlement provides for a combined

⁷ There are nine factors that courts consider in assessing a settlement's substantive terms at final approval. See *Grinnell Corp.*, 495 F.2d at 463. Those factors are discussed herein only to the extent they provide a useful guide for evaluating a settlement's fairness at this preliminary stage.

approach to prosecuting Defendants facing liability in this action that is of benefit to Class members and offers finality to Defendants seeking a negotiated resolution.

1. The Proposed Settlement is the Result of Diligent, Arm's Length Negotiations Conducted by Highly Experienced Counsel.

The negotiations that resulted in the proposed settlement were fairly conducted by highly qualified counsel who endeavored to obtain the best possible result for their clients and the Settlement Class. *See* Hausfeld Decl. ¶¶ 5-10. When counsel for the parties engage in diligent arm's length negotiations, a settlement is generally entitled to a presumption of fairness. *See In re NASDAQ Mkt. Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) ("*NASDAQ II*"). Moreover, when a settlement is the product of negotiations between experienced and informed counsel, courts tend to give counsel's opinion considerable weight because they are closest to the facts and risks associated with continuing the litigation. *See In re PaineWebber Ltd. Partnerships Litigation*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997).

The Court previously found that Interim Co-Lead Counsel are highly capable and have the requisite qualifications and experience to lead this litigation on behalf the proposed Settlement Class. (Docket No. 183). The terms of the Settlement Agreement were negotiated through extensive meetings and discussions over the course of several years, and included various mediation sessions. *See* Hausfeld Decl., ¶¶ 5-7. During this period of time, there were numerous in-person meetings, telephone calls and email exchanges regarding the settlement terms. *See id.*, ¶ 6. The discussions were meaningful and informed as Interim Co-Lead Counsel took many steps to insure that they had all necessary information to advocate for a fair settlement that serves the best interests of the Settlement Class. Interim Co-Lead Counsel analyzed all the contested legal and factual issues posed by the litigation in order to make accurate demands and evaluations of Bank of

America's positions. *See id.*, ¶ 7-9. It is the opinion of all Interim Co-Lead Counsel that this settlement with Bank of America is fair and reasonable. *Id.* ¶ 10.

2. The Proposed Settlement is Within the Range of Possible Approval.

To preliminarily approve the Settlement Agreement, the Court must determine that the proposed settlement falls within the range of settlements that could possibly be worthy of final approval as "fair, adequate and reasonable." *NASDAQ I*, 176 F.R.D. at 102. The settlement here contains a substantial cash payment and non-cash benefits that will likely improve Plaintiffs' chances of recovery from the remaining non-settling Defendants. Under these circumstances and considering the overall benefits, the proposed settlement is an excellent result for the Settlement Class.

Continuing this litigation against Bank of America would involve a protracted and expensive battle, involving complex legal and factual issues with vigorously contested motion practice. In motion practice and at trial, Bank of America would assert defenses, making the outcome uncertain for both parties because it would turn on issues of proof, many of which would be the subject of complicated expert testimony, particularly with regard to the nature of Municipal Derivatives Transactions, the effect of the alleged wrongdoing, and damages.⁸ *NASDAQ II*, 187 F.R.D. at 475-76; *see also W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) ("It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced."). Additionally, even after trial is concluded, there could potentially be one or more lengthy appeals. *See In re Michael Milken & Assoc. Sec. Litig.*, 150 F.R.D. 57, 65 (S.D.N.Y. 1993). Given this uncertainty, "[a] very large bird in the hand of this litigation is surely worth more than whatever

⁸ Because Interim Co-Lead Counsel may have to litigate against other Defendants through trial and appeal, their duties to the Class preclude a full discussion of potential litigation risks.

birds are lurking in the bushes.” *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995).

The settlement with Bank of America is also reasonable because Bank of America, in conjunction with a September 12, 2007 Confidentiality Agreement, has provided significant cooperation under Section 213(b) of ACPERA, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, §213(b), 118 Stat. 665, 666 (codified as amended at 15 U.S.C. § 1 note). The ACPERA provisions eliminate treble damages and joint and several liability for successful leniency applicants that provide “satisfactory cooperation” to civil claimants.

Further, because liability under the Sherman Act is joint and several, this settlement in no way prejudices the ability of the Class to recover its full treble damages caused by the alleged conspiracy. The Settlement Agreement secures Bank of America’s reasonable cooperation to Plaintiffs, whose claims against the non-settling Defendants continue. *See In re Ampicillin Antitrust Litig.*, 82 F.R.D. 652, 654 (D.D.C. 1979) (approving settlement where class would “relinquish no part of its potential recovery” due to joint and several liability and where settling defendant’s “assistance in the case against [a non-settling defendant] will prove invaluable to the plaintiffs.”).

For the foregoing reasons, the Settlement Agreement is well within the possible range of final approval as “fair, reasonable and adequate” resolutions of Plaintiffs’ claims against Bank of America. *See Grinnell Corp.*, 495 F.2d at 463; *see also In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 510 (E.D.N.Y. 2003) (fact that class faced long trial and additional time it would take to exhaust all appeals “weigh[ed] heavily in favor of approving the Settlements.”).

C. The Proposed Settlement Class Should Be Certified For Purposes of Settlement Pursuant to Rule 23

The Second Circuit has long recognized the propriety of certifying a class solely for purposes of settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *In re Global Crossing*, 225 F.R.D. at 451. Requests for conditional certification “typically result[] in ‘conditional certification’ of a representative class.” *Steele v. SWS, LLC*, 2011 U.S. Dist. LEXIS 83191 (E.D. Tenn. June 24, 2011). Conditional certification is appropriate to facilitate notice of a preliminarily approved settlement. *E.g. DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 939 (10th Cir. 2005) (describing simultaneous preliminary settlement approval and conditional class certification); *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 815 (6th Cir. 2004) (same); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 526 (3rd Cir. 2004) (same).

A court may grant certification where, as here, the proposed Settlement Class satisfies the four requirements of Rule 23(a) and at least one subsection of Rule 23(b). *See Weinberger*, 698 F.2d at 73. Here, Plaintiffs seek certification of the following Class:

All state, local and municipal government entities, independent government agencies, quasi-government, non-profit and private entities that (i) purchased by negotiation, competitive bidding or auction Municipal Derivative Transactions with Defendant, the Releasees or any Alleged Provider Defendant or Alleged Provider Co-Conspirator, or (ii) purchased by negotiation, competitive bidding or auction Municipal Derivative Transactions brokered by any Alleged Broker Defendant or Alleged Broker Co-Conspirator, at any time from January 1, 1992 through August 18, 2011, in the United States and its territories or for delivery in the United States or its territories, excluding (a) any entity that provided Defendant with a release of any claims it may have against Defendant as a result of opting into the State AG Settlement; (b) any state whose Attorney General enters into the State AG Settlement; (c) any entity that has otherwise settled with Defendant and/or otherwise provided a release of any claims it may have against Defendant; (d) the Defendant or Releasees; (e) any Alleged Provider Defendant, Alleged Provider Co-Conspirator, Alleged Broker Defendant and Alleged Broker Co-Conspirator; and (f) any judge, justice or

judicial officer presiding over this matter and the members of their immediate families and judicial staffs.

See Ex. 1 at ¶ 4.

1. The Settlement Class Meets the Requirements of Rule 23(a).

a. Numerosity

Rule 23(a) requires that a class be so numerous that joinder of all members would be “impracticable.” Fed. R. Civ. P. 23(a)(1). While there is no magic number that satisfies this requirement and a plaintiff need not allege the exact number or identity of all class members, courts in the Second Circuit generally “find a class sufficiently numerous when it comprises forty or more members.” *In re Indep. Energy Holdings*, 210 F.R.D. 476, 479 (S.D.N.Y. 2002); *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993).

Here, the proposed Settlement Class consists of, at least, all state, local and municipal government entities, independent government agencies, quasi-government, non-profit and private entities that purchased by negotiation, competitive bidding or auction Municipal Derivative Transactions with Bank of America or any Defendant in the class action, at any time from January 1, 1992 through August 18, 2011. Joinder of all such entities is clearly impracticable and the numerosity requirement is easily satisfied here.

b. Common Questions of Law and Fact

Rule 23(a) further requires that questions of law or fact exist that are common to the proposed class. Fed. R. Civ. P. 23(a)(2). Plaintiffs need not show “an identity of claims or facts among class members; instead, [t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with grievances of the proposed class.” *In re Global Crossing*, 225 F.R.D. at 451 (quoting *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 184 (3d Cir. 2001)); see also *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997).

“We quite agree that for purposes of Rule 23(a)(2), [e]ven a single [common] question ‘will do.’” *Walmart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2556 (2011) (brackets and quotes in original).

This prerequisite is readily satisfied for the Settlement Class. Herbert & Conte, *Newberg on Class Actions* (4th ed. 2002) § 3:10 at 278 (in an “antitrust action on behalf of purchasers who have bought the defendants’ products at prices that have been maintained above competitive levels by unlawful conduct, the courts have held that the existence of an alleged conspiracy or monopoly is a common issue that will satisfy the Rule 23(a)(2) prerequisite”). In cases of *per se* illegal horizontal conspiracies, courts “have consistently held that the very nature of a conspiracy in an antitrust action compels a finding that questions of common questions of fact and law exist.” *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2006 WL 1530166 *3 (N.D.Cal. June 5, 2006) (quoting *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 351 (N.D.Cal. 2005)).

Here, Plaintiffs’ allegations raise questions of law and fact common to the proposed Settlement Class, including, for example: whether Defendants engaged in a combination or conspiracy to fix, maintain or stabilize the price of, and to rig bids and allocate customers and markets for, Municipal Derivative Transactions; the duration of the conspiracy alleged in the CAC and the nature of the acts performed by Defendants in furtherance of the alleged conspiracy; whether the alleged conspiracy violated Section 1 of the Sherman Act; the effect of the alleged conspiracy on the market for Municipal Derivative Transactions; and whether the alleged conspiracy caused injury to the business or property of Plaintiffs and other members of the Settlement Class. Proof of the allegations in the complaint will clearly be common to all members of the Settlement Class.

c. Typicality

Third, Rule 23(a) requires that claims of Class Plaintiffs be typical of the claims of other Class members. *See* Fed. R. Civ. P. 23(a)(3). The typicality requirement is satisfied where, as here,

the claims of the representative plaintiffs arise from the same course of alleged conduct that gives rise to the claims of other class members. *See, e.g., In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 241 (E.D.N.Y. 1998). “Indeed, when ‘the same [alleged] unlawful conduct was directed at or affected both the named plaintiffs and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims.’” *In re Global Crossing*, 225 F.R.D. at 452 (citation omitted); *see Newberg on Class Actions* § 3.13 (4th ed. 2002) (“typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims”).

Here, the claims of the representative Plaintiffs are typical when compared to the claims of other members of the Settlement Class. Plaintiffs allege that Defendants, including Bank of America, created and maintained an illegal cartel in the municipal derivatives industry. The claims of the representative Plaintiffs, like those of the Settlement Class, arise from the same alleged anticompetitive conduct by the same Defendants and are based on the same legal theories. Accordingly, Plaintiffs satisfy the typicality requirement. *See id.*

d. Adequacy

Finally, Rule 23(a) requires that the representative parties fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(4). As the Second Circuit has noted, “adequacy of representation is measured by two standards. First, class counsel must be ‘qualified, experienced and generally able’ to conduct the litigation. Second, the class members must not have interests that are ‘antagonistic’ to one another.” *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992); *see also In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 142 (2d Cir. 2001).

Both requirements are satisfied here for the Settlement Class. As this Court previously determined, Interim Co-Lead Counsel are qualified, experienced and thoroughly familiar with

complex antitrust class action litigation (Docket Nos. 183, 1208). Moreover, in reaching the Settlement Agreement, the interests of all Class members were adequately protected and there are no conflicts between or among the named Plaintiffs and other Class members. All Class members share an overriding interest in obtaining the largest monetary recovery possible from Bank of America. *See Global Crossing*, 225 F.R.D. at 453 (certifying settlement class and finding that “[t]here is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery.”). The Class members here also share common interest in obtaining Bank of America’s early settlement and reasonable cooperation. For all the reasons set forth above, the adequacy requirement is satisfied.

2. The Settlement Class Meets the Requirements of Rule 23(b)(3).

Once the four prerequisites of Rule 23(a) are satisfied, plaintiffs in a class action must also show that a proposed Settlement Class meets the requirements of Rule 23(b). Under Rule 23(b)(3), Plaintiffs here must first demonstrate that “questions of law or fact common to class members predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). In addition, Plaintiffs must show that a “class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” *Id.* With respect to both requirements, the court need not inquire whether the “case, if tried, would present intractable management problems, for the proposal is that there be no trial.” *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (citation omitted).

a. Common Questions of Law and Fact Predominate.

The complaint alleges a single conspiracy from which all Plaintiffs’ injuries arise. Issues common to the Class members – for example, the existence and scope of the alleged conspiracy among Defendants, the impact of Defendants’ conspiracy, and the amount of damage suffered by the Class as a result of an alleged violation of Section 1 of the Sherman Act – predominate over

any individual questions. Accordingly, class treatment of the claims is appropriate for purposes of the settlement. *Amchem Prods. Inc.*, 521 U.S. at 625 (“Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws”). *See also In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 534 (6th Cir. 2008), *cert. denied*, 129 S.Ct. 1673 (2009) (affirming class certification in bid-rigging case, holding that “even where there are individual variations in damages, the requirements of Rule 23(b)(3) are satisfied if the plaintiffs can establish that the defendants conspired to interfere with the free-market pricing structure.”); *In re Southeastern Milk Antitrust Litig.*, 2010 U.S. Dist. LEXIS 94223 (E.D. Tenn. Sept. 7, 2010), (citing *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 518 (S.D.N.Y. 1996) (“existence of a conspiracy is the predominant issue for price fixing cases, warranting certification of the class even where significant individual issues are present”)); *In re Buspirone Patent Litig.*, 210 F.R.D. 43, 58 (S.D.N.Y. 2002) (citation omitted) (finding predominance requirement satisfied where “[p]roof of the allegedly monopolistic and anti-competitive conduct at the core of the alleged liability is common to the claims of all the plaintiffs”); *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 247 (E.D.N.Y. 1998) (finding predominance where case involved allegations of “pricing structure to regulate prices . . . , to maintain prices at artificially high levels, and to hinder price competition”).

Here, the predominance prong is thus easily satisfied.

b. A Class Action is the Superior Means of Adjudicating Plaintiffs’ Claims.

The Court must balance, in terms of fairness and efficiency, the advantages of class action treatment against alternative available methods of adjudication. *In re Nigeria Charter Flights Contract Litig.*, 233 F.R.D. 297, 301 (E.D.N.Y. 2006); *see* Fed. R. Civ. P. 23(b)(3) (listing four considerations relevant to this determination). The Court needs to consider “the efficient

resolution of the claims or liabilities of many individuals in a single action, as well as the elimination of repetitious litigation and possibly inconsistent adjudications.” *D’Alauro v. GC Servs. Ltd. P’ship*, 168 F.R.D. 451, 458 (E.D.N.Y. 1996). Here, any interests of Class members in individually controlling the prosecution of separate claims are outweighed by the efficiency of the class mechanism. At minimum, hundreds of entities engaged in Municipal Derivative Transactions with Bank of America and/or other Defendants during the proposed Class period, and settling their claims in the context of a class action will conserve both judicial and private resources, and will hasten recovery. *See In re Buspirone Patent Litig.*, 210 F.R.D. at 58 (“The numerous common issues of fact and law and the difficulty of numerous individual lawsuits indicates that a class action is superior to other methods for a fair and efficient adjudication of the controversy.”); *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d at 249 (certifying a class because “proceeding forward as a class action for liability is superior and would avoid duplication, unnecessary costs and a wasting of judicial resources”). Therefore, a class action resolution is superior to the individual prosecution of these complex claims.

D. Notice to the Class

In the event that the Court preliminary approves the Settlement Agreement, Class Plaintiffs’ Counsel will submit a Notice plan to this Court, similar to the plans previously approved by this Court for prior settlements. Notice will provide Class members with the date of the hearing scheduled by the Court to consider the fairness, adequacy, and reasonableness of the proposed Settlement. *See* Ex. 1 at ¶ 5. This Notice will include the general terms of the settlement as set forth in the Settlement Agreement, general terms of the proposed distribution plan, the general terms of the fee and expense application, and a description of Class members’ rights to object to the Settlement Agreement, request exclusion from the Class, and/or appear at the settlement hearing. *Id.*

IV. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Preliminary Approval and certify the Settlement Class.

Dated: December 4, 2013

Respectfully submitted,

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Plaintiffs' Co-Lead Interim Class Counsel

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE MUNICIPAL DERIVATIVES	)	Master Docket No. 08 Civ. 2516 (VM) (GWG)
	)	
ANTITRUST LITIGATION	)	MDL No. 1950
	)	
	)	
This Document Relates to:	)	
	)	
ALL ACTIONS	)	
	)	
	)	

**[PROPOSED] ORDER PRELIMINARILY APPROVING
CLASS ACTION SETTLEMENT**

WHEREAS, Class Plaintiffs’ Counsel (as defined in the Settlement Agreement, dated October 18, 2013 (“Agreement”)) have applied for an order preliminarily approving the terms and conditions of the Settlement with defendant Bank of America, N.A. (“Defendant”), as set forth in the Agreement, together with the Exhibits annexed thereto;

WHEREAS, the Settlement requires, among other things, that all Released Claims against Releasees be settled and compromised;

WHEREAS, this application is uncontested by Defendant; and

WHEREAS, this Court having considered the Agreement and Exhibits annexed thereto, Class Plaintiffs’ Motion for Preliminary Approval of the Settlement and all papers filed in support of such motion;

NOW, THEREFORE, pursuant to the Federal Rule of Civil Procedure 23, it is hereby ORDERED that:

1. The capitalized terms used herein shall have the meanings set forth in the Agreement.
2. The Court preliminarily approves the Settlement as set forth in the Agreement, including the releases contained therein, as being fair, reasonable and adequate to the Class, subject to the right of any Class Member to challenge the fairness, reasonableness or adequacy of the Agreement and to show cause, if any exists, why a final judgment dismissing the Action against Defendant, and ordering the release of the Released Claims against Releasees, should not be entered after due and adequate notice to the Class as set forth in the Agreement and after a hearing on final approval.
3. The Court finds that the Agreement was entered into at arm's length by highly experienced counsel and is sufficiently within the range of reasonableness that notice of the Agreement should be given as provided in the Agreement.
4. The Court conditionally certifies the Class (set forth herein) for purposes of the Settlement as to Defendant:

All state, local and municipal government entities, independent government agencies, quasi-government, non-profit and private entities that (i) purchased by negotiation, competitive bidding or auction Municipal Derivative Transactions from Defendant and/or Releasees or any Alleged Provider Defendant or Alleged Provider Co-Conspirator, or (ii) purchased by negotiation, competitive bidding or auction Municipal Derivative Transactions brokered by any Alleged Broker Defendant or Alleged Broker Co-Conspirator, at any time from January 1, 1992 through August 18, 2011, in the United States and its territories or for delivery in the United States or its territories, excluding (a) any entity that provided Defendant with a release of any claims it may have against Defendant as a result of opting into the State AG Settlement; (b) any state whose Attorney General entered into the State AG Settlement; (c) any entity that has otherwise settled with Defendant and/or otherwise provided a release of any claims it may have against Defendant; (d) the Defendant or

Releasees; (e) any Alleged Provider Defendant, Alleged Provider Co-Conspirator, Alleged Broker Defendant and Alleged Broker Co-Conspirator; and (f) any judge, justice or judicial officer presiding over this matter and the members of their immediate families and judicial staffs.

5. The Court finds that the certification of the Class for purposes of the Settlement as to Defendant is warranted in light of the Settlement because: (i) the Class is so numerous that joinder is impracticable; (ii) Class Plaintiffs' claims present common issues that are typical of the Class; (iii) Class Plaintiffs and Class Plaintiffs' Counsel will fairly and adequately represent the Class; and (iv) common issues predominate over any individual issues affecting the Class Members. The Court further finds that Class Plaintiffs' interests are aligned with the interests of all other Class Members. The Court also finds that resolution of this Action on a class basis for purposes of the Settlement as to Defendant is superior to other means of resolution.

6. The Court hereby appoints Class Plaintiffs' Counsel as counsel to the Class for purposes of the Settlement, having determined that the requirements of Rule 23(g) of the Federal Rules of Civil Procedure are fully satisfied by this appointment.

7. Class Plaintiffs City of Baltimore, Maryland, the Central Bucks School District, and the Bucks County Water & Sewer Authority will serve as representatives of the Class for purposes of the Settlement.

8. As of the date hereof, all proceedings in the Action as to Defendant shall be stayed and suspended until further order of the Court, except as may be necessary to implement the Settlement or comply with the terms of the Agreement.

9. All protective orders in force as of the date of this Order are hereby amended to apply to all materials and information provided by Defendant in connection with the Settlement (including but not limited to information with respect to the potential or actual Class Members).

10. The Court hereby schedules a hearing to occur on _____, 2014, at _____ a.m. in Courtroom _____ at _____ to determine whether (i) the proposed Settlement as set forth in the Agreement, should be finally approved as fair, reasonable and adequate pursuant to the Federal Rule of Civil Procedure 23; (ii) an order approving the Agreement and a Final Judgment should be entered; and (iii) the application of Class Plaintiffs' Counsel for an award of attorneys' fees and expenses in this matter should be approved. All papers in support of final approval of the Settlement shall be filed thirty (30) days before the fairness hearing. No later than twenty (20) days before the hearing, all papers shall be filed and served by objectors or persons other than the parties to the Action. No later than seven (7) days before the hearing, all relevant reply papers shall be filed and served by the parties to the Action.

11. Neither this Order, the Agreement, the Settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Agreement or Settlement is or may be used as an admission or evidence (i) of the validity of any claims, alleged wrongdoing or liability of Defendant or (ii) of any fault or omission of Defendant in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal.

12. Neither this Order, the Agreement, the Settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Agreement or Settlement is or may be used as an admission or evidence that the claims of Class Plaintiffs lacked merit in any proceeding against anyone other than Defendant in any court, administrative agency or other tribunal.

13. In the event that the Agreement is terminated in accordance with its provisions, the Settlement and all proceedings had in connection therewith shall be null and void, except insofar as expressly provided to the contrary in the Agreement, and without prejudice to the status quo ante rights of Class Plaintiffs, Defendant and the Class Members.

14. No later than ten (10) days after the Motion for Preliminary Approval of the Settlement has been filed with the Court, Defendant will serve the Class Action Fairness Act (“CAFA”) Notice on the Attorney General of the United States and the state attorneys general as required by 28 U.S.C. § 1715(b). Thereafter, Defendant will serve any supplemental CAFA Notice as appropriate.

ENTERED this __ day of _____ 2013.

Hon. Victor Marrero